IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PACIFIC NATURAL GAS CO.,
a corporation,
Petitioner,

vs.

FEDERAL POWER COMMISSION,
Respondent.

No. 16498

REPLY BRIEF OF PETITIONER

Upon Review of Order of Federal Power Commission

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ARGUMENT

I

The contract does not give Pipeline Corporation the right to unilaterally file increased rates for industrial gas under Section 4 of the Act.

It is readily conceded by Petitioner that absent the contract provision "Buyer shall have the right to protest any such new rate schedules and changes before the Federal Power Commission" we would have a typical "Memphis" type agreement. But when Pacific North-

west drew a contract reserving to itself the right to file from time to time under Section 4 of the Act such new schedules and changes in its existing tariff as it might find necessary to, among other things, attract capital, insure expansion and provide adequate natural gas service to its customers, and concluded with the assurance that the Buyer should have the right to protest any such new rate schedules and changes before the Federal Power Commission, this latter provision qualified the reserved right and limited it to those situations where, under the law, the buyer does have an effective right to protest.

Respondent says, on page 16 of its Brief, that

> ". . . the purpose of the right to protest accorded to Petitioner in this case can only be to negate any possible contention by Pacific Northwest that Petitioner had waived its right to protest the justness and reasonableness of changed rates."

Neither the language of Paragraph 10 of the General Terms and Conditions preceding the last sentence thereof, nor the language of Article III of the Service Agreement could possibly be construed to constitute a waiver by the buyer of its right to protest rate increases. In light of its public service obligation, Petitioner's power to waive such a right may well be doubted, and certainly the Respondent would never approve such a contract provision. However, such considerations are not of moment here. Since the language of the contract, absent that relating to the right of protest, could not be construed as a waiver, the sentence would be wholly unnecessary and without purpose if given the meaning which Respondent ascribes to it.

On page 10 of its Brief, Respondent refers to ". . . petitioner's reservation . . ." of a "right to protest". This is an inaccurate description of the provision. Petitioner's right to protest rate increases is accorded by the Act and the regulations promulgated by the Commission under the authority granted by the Act. As stated by Intervener, it could grant Petitioner no right of protest not provided for by the Act, and we submit it could not deprive Petitioner of any right of protest accorded under the Act. The sentence, when read in light of the preceding language of Paragraph 10, reserving the right to make unilateral changes by filings under Section 4 of the Act, and when read in the context of Section 4 of the Act, becomes completely meaningful when read as limiting the reserved right to make such unilateral changes to those situations where the Buyer has a realistic right to protest.

On page 10 of its Brief Intervener makes the following assertion:

> "The true rule, as the Supreme Court held in the *Memphis* case, is that the seller may change the rate and file it under §4(d) unless he has agreed by contract not to do so. 358 U.S. 103, 111, 112-3. What is needed, therefore, to avoid the *Mobile* result is not an agreement to a specific new rate, but merely the absence of any agreement that no new rate will be filed."

This conception of the Memphis holding persists throughout its Brief. We submit that Intervener claims too much for the decision. That decision holds that if there is a contract between the Pipeline and the distributor, its

terms control the right to make changes in rates and according to those terms the Pipeline Company either has or does not have the right to change its rates unilaterally. If there is no contract, the Pipeline Corporation may file its rates ex parte and they can be changed ex parte. In deciding that case, the court said:

> "What has been said disposes of the question whether anything in the Natural Gas Act forbids a seller to change its rates pursuant to §4 procedures simply because its customers have not agreed to the amount of the rate as changed. There remains the question whether United's service agreements reserved to it the power to make rate change in this manner."
>
> *United Gas Pipe Line Co. v. Memphis Light, Gas & Water Division,* 358 U.S. 103; 3 L ed. 2d, 153, 161.

The contract was that of Intervener, prepared by it, filed by it with the Commission, and offered by it to its customers, including Petitioner. The controlling rule of construction under these circumstances is not that referred to by Intervener on page 14 of its Brief, but is the rule that any doubt or ambiguity in the meaning of the contract will be resolved against the Intervener who prepared it, and in favor of the Petitioner. *Wenatchee Production Credit Association v. Pacific Fruit & Produce Co.,* 199 Wash. 651, 92 P.(2d) 883; *Zinn v. Equitable Life Insurance Co. of Iowa,* 6 Wn.(2d) 379, 107 P.(2d) 921; *Willett v. Davis,* 30 Wn.(2d) 622, 193 P.(2d) 321. Intervener argues that such a construction of the contract would nullify the express language reserving to it the right to unilaterally amend its rate schedules and file

such new rates under Section 4 of the Act. This does not follow, because those contract provisions would apply without limitation to rates for all gas other than industrial gas, and as Intervener pointed out on page 2 of its Brief, only a small fraction of the rate increases applied for August 6, 1957 applied to sales of industrial gas to Petitioner here.

On page 20 of its Brief Intervener cites *Nevada Natural Gas Pipe Line Co. v. FPC*, 267 F.(2d) 405 (C.A.5) as controlling precedent. What it does not say is that the rate increases there concerned with did not relate to industrial gas. They were all suspended and permitted to become effective at the end of the suspension period upon the pipe line company giving security to make refunds, if the increased rates were subsequently determined to be unjustified. Necessarily the questions for decision in this case could not have been reached in that case.

That Petitioner for a period of time between the decision of the Court of Appeals in *Memphis Light, Gas & Water Division v. FPC*, 250 F.(2d) 402 (C.A.D.C.) and the reversal of that decision by the Supreme Court of the United States believed itself to be protected on the broad basis of that decision below, only to have that protection cut away as a result of the reversal, cannot mitigate against the position now taken. There is no basis for claim of estoppel, either legal or equitable, nor is any inference properly to be drawn because other interested parties may or may not have seen fit to appeal from the adverse decision of the Respondent to this court.

The Petitioner's argument that the Commission's finding as to the nature of the contract is supported by substantial and uncontradicted evidence is fallacious. There is no evidence beyond the pleadings, and findings can be predicated only upon evidence in the record in the instant proceeding. *Atlantic Refining Co. v. Public Service Commission of New York,* 360 U.S. 378, 3 L ed. 2d 1312.

The contract, when read as a whole, did not grant Intervener the right to change rates for industrial gas unilaterally. Accordingly, the rate fixed by the Service Agreement, namely the rate on file with the Federal Power Commission at the time the Service Agreement was signed, must remain the contract rate until changed by mutual agreement of the parties, or as the result of a proceeding under Section 5 of the Act.

II

CONSTITUTIONALITY

Unless the filing made August 6, 1957, increasing industrial gas rates, is stricken, then from September 6, 1957 until some uncertain time in the future, Petitioner must pay these increased rates, no matter how unjust, unreasonable or discriminatory and any relief will be only prospective. This violates fundamental concepts of reasonableness and due process. We are not here concerned with the general constitutionality of the Act, but only with the provisions of Section 4 as they relate to industrial gas.

In *Hope Natural Gas Co. v. Federal Power Commission,* 196 F.(2d) 803, 809 (C.A.4) the court, in upholding the five months' permissible suspension period provision of Section 4(e) of the Act, said:

> "It is true, of course, that a utility is entitled to rates that are just and reasonable; but this is not to say that rates must fluctuate automatically with every change in economic conditions or that a reasonable time may not be allowed for determining the reasonableness of a proposed increase in rates before it is allowed to go into effect. Any loss sustained by a maintenance of the status quo while such determination is being made is properly considered, not as a violation of constitutional right, but as a necessary incident of rate regulation so long as the period of suspension does not 'overpass the bounds of reason.' See *American Telephone & Telegraph Co. v. United States,* 299 U.S. 232, 247, 57 S.Ct. 170, 177, 81 L.ed. 142; *Federal Power Commission v. East Ohio Gas Co.,* 338 U.S. 464, 475, 70 S.Ct. 266, 94 L.ed. 268. It is not contended, nor could it reasonably be, that the five months suspension period allowed by the statute is so unreasonable as to amount to a denial of due process. As pointed out by Senator Elkins with respect to the suspension provision of the Mann-Elkins Act, a limited period of suspension pending an investigation of proposed increases is 'a reasonable limitation upon the exercise of the property rights of the carrier (utility) in fixing a rate.' 45 Cong. Record 3472."

We are not here dealing with a situation of "give and take" necessarily involved in the practicalities of the regulatory process. We are not dealing with a situation where the status quo is being preserved. Petitioner's business consists almost entirely in the purchase from Intervener and resale to its customers of industrial gas. The

amounts of money involved are very substantial. Even more substantial to Petitioner is the threatened loss of a great percentage of its business and the actual realized loss of business because of its industrial customers cutting back to their contract minimums. The period of time which has already elapsed is wholly unreasonable and the additional time which will elapse before Petitioner may obtain relief of any kind compounds that unreasonableness. Intervener will, to the extent that its rates are unreasonable, unjust or discriminatory, receive a "windfall" and Petitioner will be forever deprived of its property and business without any recourse whatever. Respondent has not pointed to any public purpose to be served by such a statutory scheme, and we submit there can be none.

Intervener argues that failure of Congress to regulate all phases of commerce within an area cannot be a denial of due process. This misconceives the present situation. Our complaint is that Congress gave Intervener too much protection and power without sufficient complementary powers in the F.P.C. to protect the public interest.

The licensing provisions of the Act create or confirm new or existing monopolies or quasi-monopolies. In the case of Intervener, its monopoly in the State of Washington is presently complete. The scope of the Act is comprehensive, and as Intervener properly points out, primary jurisdiction rests with the Commission. Petitioner has no recourse during the long years necessary

to obtain an adjudication by the Federal Power Commission.

If industrial gas were unregulated, we contend that Petitioner would have had a common law right to sue for reparation of unjust charges. Such was the recognized common law right of shippers. In *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Railway Company*, 284 U.S. 370, 76 L. ed. 348, the Supreme Court of the United States said:

> "The exaction of unreasonable rates by a public carrier was forbidden by the common law. *Interstate Commerce Commission v. Baltimore & O. R. Co.* 145 U.S. 263, 275, 36 L.ed. 699, 703, 4 Inters. Com. Rep. 92, 12 S.Ct. 844. The public policy which underlay this rule could, however, be vindicated only in an action brought by him who paid the excessive charge to recover damages thus sustained. Rates, fares, and charges were fixed by the carrier, which took its chances that in an action by the shipper these might be adjudged unreasonable and reparation be awarded."

We do not find any case holding this rule applicable or inapplicable to customers of a gas pipe line company which has dedicated its property to public use. However, we perceive no basis in principle for any distinction. And whatever may be thought as to the right of reparation at common law, there can be no denial that, absent primary jurisdiction in the Commission, the courts would have been open to an action for injunctive relief against continued unjust, unreasonable or discriminatory rates.

Intervener argues, as we understand it, that in any event, absent the Act, Petitioner should be required to pay the increased rates under its contract. This argument again misconceives the situation. If the Section 4 filing of increased industrial gas rates is rejected, then the rate fixed by the tariff originally filed continues under the terms of the contract until effectually superseded. This could only be done by a rate specifically agreed to and filed under Section 4 or a rate promulgated under Section 5. However, the only question here is whether the filing should have been rejected.

Respondent argues that Petitioner did not have to purchase industrial gas, but could have served its customers with gas purchased under other rates schedules where the Commission has the power to suspend and at the end of the suspension period to permit rates to become effective upon filing of security for refund. Of course, Petitioner did not have to go in the gas business at all. More than ninety-eight per cent of its business involves delivery of gas to customers for industrial use. It has contracted with its customers to furnish to them such gas. The choice which Respondent would offer is, in realistic fact, non-existent.

We submit that the order of the Respondent denying the motion to reject the filing of the Intervener's increased rates for industrial gas should be reversed upon both of the grounds presented on the appeal.

Respectfully submitted,

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